PRIVY COUNCIL REPORT

LINGGI PLANTATIONS LTD. v. JAGATHEESAN

[P.C. (Lord Hailsham L.C., Lord Hodson and Lord Cross of Chelsea) December 7, 1971]

[Privy Council Appeal No. 22 of 1970]

Contract — Construction — Terms — Agreement for sale of land — Non-completion of sale by purchaser — Deposit — Whether vendor entitled to forfeit — Contracts (Malay States) Ordinance, 1950 ss. 65, 75 — Application of.

Land Laws — Agreement for sale — Non-completion by purchaser — Whether entitles vendor to forfeit deposit.

Contract — "Deposit" and "earnest money" — Whether any difference in meaning.

This was an appeal from a decision of the Federal Court ([1969] 2 M.L.J. 253) allowing an appeal by the plaintiff from the judgment of the High Court ([1967] 1 M.L.J. 177).

The question for determination in the proceedings was whether a vendor was entitled to forfeit a deposit paid on a contract for the sale of real property following its non-completion by the purchaser, though the vendor was not in a position to prove actual damage flowing from the purchaser's breach of contract.

The appeal raised three points: (1) whether on the true construction of the contract the vendor was entitled to forfeit the whole deposit notwithstanding his inability to prove that he had suffered damage by reason of the purchaser's failure to complete; (2) whether in the circumstances section 75 of the Contracts (Malay States) Ordinance, 1950, which is in the same terms as the section 74 of the Indian Contract Act as amended, applied to the forfeiture in question so as to entitle the purchaser to recover his deposit notwithstanding his failure to complete; (3) whether section 65 of the Contracts (Malay States) Ordinance which is in the same terms as section 64 of the Indian Contract Act applies to the forfeiture in question so as to oblige the vendor to return the deposit on termination of the contract as a benefit received under the contract.

Held, allowing the appeal: (1) the contract meant, unambiguously, that in the event of a failure by the purchaser to complete and notice to terminate being given, the vendor was at liberty to forfeit the deposit and to claim for any damage which he had suffered over and above the amount of the deposit, after giving credit for the amount of the deposit;

(2) section 65 of the Ordinance was not applicable to the circumstances of the existing case. The point raised was not one which could be sustained in the light of the authorities and the language of the section;

(3) once it was decided that the construction of the contract was such that the sum of $377,500 was paid as a true deposit and was thus to be liable to forfeiture under the contract, in case of failure by the purchaser to complete, section 75 of the Ordinance could have no application when the contract was properly terminated, and the deposit was forfeited whether or not damage was proved. There was no difference in this context between the expression "deposit" and the expression "earnest money". A reasonable deposit has always been regarded as a guarantee of performance as well as a payment on account, and its forfeiture has never been regarded as a penalty in English law or common English usage.

Cases referred to:-

(1) *Howe* v. *Smith* (1884) 27 Ch. D. 89.

(2) *Shuttleworth* v. *Clews* [1910] 1 Ch. 176.

(3) *Wallis* v. *Smith* (1882) 21 Ch. D. 243.

(4) *Mayson* v. *Clouet* [1924] A.C. 980.

(5) *Natesa Aiyar* v. *Appavu Padayachi* I.L.R. 38 Mad. 178.

(6) *Naresh Chandra Guha* v. *Ram Chandra Samanta & Ors.* A.I.R. 1952 Cal. 93.

(7) *P.M. Pillay* v. *Kampur Rubber and Tin Co. Ltd.* [Civil Suit No. 153 of 1959] Unreported.

(8) *Muralidahar Chatterjee* v. *International Film Co. Ltd.* L.R. (1942) 70 I.A. 35.

(9) *Naresh Chandra* v. *Ram Chandra* A.I.R. 1952 Cal. 93.

(10) *Bhai Panna Singh* v. *Bhai Arjun Singh* A.I.R. 1929 P.C. 179.

(11) *Manian Patter* v. *The Madras Railway Co.* I.L.R. 29 Mad. 118.

(12) *Chiranjit Singh* v. *Har Swarup* A.I.R. 1926 P.C. 1.

(13) *Mool Chand Behari Lal* v. *S.D. Chand & Co.* A.I.R. 1947 Lah. 112.

(14) *Fateh Chand* v. *Balkishan Dass* [1963] 2 S.C.R. 1405.

(15) *Ex parte Barrell* L.R. 10 Ch. 512.

(16) *Soper* v. *Arnold* (1889) 14 App. Cas. 429.

(17) *Stockloser* v. *Johnson* [1954] 1 Q.B. 476.

PRIVY COUNCIL.

C. S. Staughton Q.C. (*M. A. Pickering* with him) for the appellants.

Respondent unrepresented.

Lord Hailsham L.C. (delivering the judgment of the Board): This is an appeal from a decision of the Federal Court of Malaysia (Ong C.J., Suffian and Ali F.JJ.) allowing on 26th July 1969 an appeal by the plaintiff from the judgment of Gill J. (as he then was) given in the High Court in Malaya at Kuala Lumpur on 25th November 1966.

The question in the proceedings was whether a vendor was entitled to forfeit a deposit paid on a contract for the sale of real property following its non-completion by the purchaser though the vendor was not in a position to prove actual damage flowing from the purchaser's breach of contract.

The appeal raises three points:

1. Whether on the true construction of the contract the vendor was entitled to forfeit the whole deposit notwithstanding his inability to prove that he had suffered damage by reason of the purchaser's failure to complete.
2. Whether in the circumstances section 75 of the Contracts (Malay States) Ordinance of 1950, which is in the same terms as the section 74 of the Indian Contract Act as amended, applied to the forfeiture in question so as to entitle the purchaser to recover his deposit notwithstanding his failure to complete.
3. Whether section 65 of the Contracts Ordinance which is in the same terms as section 64 of the Indian Contract Act applies to the forfeiture in question so as to oblige the vendor to return the deposit on termination of the contract as a benefit received under the contract.

Under a contract of sale dated 25th May 1962 the present appellants, who were defendants in the proceedings, were the vendors of an estate of 1,488 acres of land at a price of $3,775,000. The completion date was 90 days from the date of the contract and thus expired on or before 24th August 1962. The contract provided for the payment of a 10% deposit, that is $377,500, receipt of which was acknowledged in the contract. There was a provision for forfeiture in the event of the purchaser failing to complete. The construction of this provision is one of the main questions

for decision in the appeal. The relevant clauses of the contract were clauses 1 and 5. These clauses provided:

Clause 1 "Subject always to clause 2 hereof the vendor shall sell and the purchaser shall purchase the said lands excluding the areas sold upon and subject to the terms and conditions and to the rights hereinafter set forth free from encumbrances and with vacant possession at the price of dollars three million seven hundred and seventy five thousand ($3,775,000) *whereof the vendor's agents Guthrie Agency (Malaya) Limited of 4 Mountbatten Road, Kuala Lumpur have prior to the execution of these presents received the sum of dollars three hundred and seventy seven thousand five hundred ($377,500) by way of deposit and part payment.*" (Their Lordships' italics.)

Clause 5 "If due to any act or default of the purchaser the said purchase shall not be completed as herein provided the vendor shall be entitled by notice in writing to the purchaser to declare this agreement at an end and thereupon this agreement shall cease to be of any force or effect *and the sum of $377,500 (dollars three hundred and seventy seven thousand five hundred) referred to in clause 1 hereof shall be forfeited to the vendor to account of damages for breach of contract.*" (Their Lordships' italics again.)

The original purchaser under the contract assigned his rights and obligations to one S. K. Jagatheesan who has subsequently died and the present respondent is the executrix of S. K. Jagatheesan's estate. The original plaintiff in the proceedings was S. K. Jagatheesan, but after his death the respondent carried on the proceedings on behalf of the creditors of the estate. The respondent was not represented before their Lordships on the hearing of the appeal.

In the events which happened, the completion did not take place in due time and by notice dated 27th August 1962, after the date for completion had expired, the vendors gave notice that the contract was at an end and purported to forfeit the deposit under clause 5 of the agreement.

As a result the present proceedings were brought by S. K. Jagatheesan as plaintiff. The writ was dated 16th April 1963 and claimed a declaration and a return of the deposit. The present appellants originally entered a defence based on their alleged right to forfeit the deposit and a counterclaim for damages which the appellants assessed at a sum largely in excess of the amount of the deposit. In the course of the hearing this counterclaim was abandoned, and it was conceded that the defendants had in fact proved no damage as the result of the breach of contract. At first, the proceedings before Gill J. had taken the form of argument on a preliminary point of law raised by the appellants as to whether they were entitled to forfeit the deposit irrespective of whether or not damage was proved. As the trial proceeded and the counterclaim was abandoned, the treatment of the hearing as being on a preliminary point of law seems also to have been set aside, since in fact the respondent called evidence that no damage had in fact been suffered and the appellants, although given a chance of calling rebutting evidence, appear to have declined to do so. In the circumstances counsel for the appellants, who was at first disposed to complain that the Federal Court had not remitted the case for an assessment of damage, conceded that if he were to lose the appeal on the questions of law there would be nothing further left to try and the order of the Federal Court would stand.

Gill J. decided the case in favour of the present appellants. Although his judgment on this point is not very explicit, he seems to have construed clause 5 of the contract as meaning that in the event of a failure by the purchaser to complete and notice to terminate being given by the vendor, the vendor could forfeit the deposit, and that the phrase at the end of clause 5 "to account of damages for breach of contract" meant liquidated damages. If so the latter construction cannot be supported. In their Lordships' view, as will be explained later, the phrase simply means that, provided the vendors give credit for the amount of the deposit forfeited, they can go on to sue for whatever additional sum by way of damages they can prove. Gill J. further held that neither section 75 nor section 65 of the Contracts (Malay States) Ordinance 1950 affected the forfeiture of the whole deposit.

The Federal Court reversed this decision, Ong C.J. and Suffian F.J. delivering separate reasoned judgments and Ali F.J. concurring. On the question of construction, Ong C.J. held that the natural effect of the words and in particular of the words at the end of clause 5 contradicted the natural force of the references to "deposit" and "forfeiture" and meant that, in as much as the vendors were entitled in the event of non-completion by the purchaser to claim more than the amount of deposit if they had suffered more than that, the respondent was equally entitled to a refund of any sum by which the deposit exceeded the damage proved. He held that this construction was plain and the application of any *contra proferentem* rule was consequently superfluous. Suffian F.J. on the other hand, thought that there was an ambiguity in the clause as to the true intention of the parties but that this ambiguity should be resolved in favour of the purchaser so as to give it the same effect as that held to be its natural meaning by the learned Chief Justice. He accordingly held that the sum of $377,500 was not "earnest money" and was therefore liable to be refunded on the strict interpretation of the contract. Both the learned Chief Justice and Suffian F.J. held that the continued possession of the deposit by the vendors gave them an advantage which disentitled them to interest or its equivalent by way of "reasonable compensation" under section 75 of the Ordinance, and accordingly ordered the return of the whole sum by the appellants to the respondent, but without interest.

Both Ong C.J. and Suffian F.J. held that section 75 of the Contracts (Malay States) Ordinance 1950 applied to the circumstances of the case. Suffian F.J.'s reason for this opinion was closely allied to his view about the construction of the agreement, since he clearly considered that the authorities drew a distinction between what he described as "earnest money" which could be forfeited without hope of recovery and "part payments" on account of the purchase price where the contrary was true and section 75 applied. His decision appears to have been that, having held that on the true construction of the agreement "the money paid [by way of deposit] was not earnest money" it followed that the case fell on the wrong side of a line of authorities which distinguished between "deposits" or "earnest money" which were liable to for-

feiture and "instalments" or "part payments" which were recoverable to the extent that they exceeded the "reasonable compensation" envisaged by the section. It is less clear whether the judgment of Ong C.J. on the applicability of section 75 of the Contracts (Malay States) Ordinance was similarly founded on his own view of the construction of the contract. Their Lordships make the assumption, which appears to be justified by the general tenor of the judgment, that it was not so founded and that the learned Chief Justice was in fact saying that the section applied even if his construction of the contract was not correct.

In addition to the applicability of section 75, Ong C.J. also held that section 65 of the Ordinance applied and that the deposit was a "benefit under the contract" which must be handed back on "rescission" by the vendor on the contract becoming "voidable" irrespective of the applicability of section 75. This point was not supported by Suffian F.J., and their Lordships think it was not really open to the court so to decide, for the respondent appears expressly to have abandoned the point in argument and in consequence the appellants (who were then the respondents) were unable to argue it at all. In any event their Lordships think the point is unsound for the reasons which appear hereafter.

Their Lordships agree with the approach made by Ong C.J. that the first point to be considered in deciding the case is the construction of the agreement itself. In construing clause 5, however, their Lordships have reached the conclusion that the original judgment of Gill J. except insofar as he seems to have construed the last phrase as importing the doctrine of liquidated damages was correct, and that the alternative view of the Federal Court cannot be supported. Admittedly the words at the end of clause 5, "to account of damages for breach of contract" appear at first sight to be confusing. But in their Lordships' view both the learned Chief Justice and Suffian F.J. paid too little attention to the last words of clause 1 of the contract and to the reference to deposit and forfeiture in clause 5 and saw in the last words of clause 5 an inconsistency or ambiguity which on examination is found not to exist. At the end of clause 1 the payment of $377,500 is described as "by way of deposit and part payment" and in clause 5 on termination the same sum is said to be "forfeited to the vendor". Admittedly the last words of clause 5 "to account of damages for breach of contract" are a little unusual and need some explanation, but in their Lordships' view they mean no more than that the ordinary law applying to forfeiture of deposit which defines the consequences of the forfeiture of a deposit shall apply. In other words the clause means that the vendor forfeiting the deposit must give credit for the amount of the deposit paid before he claims damages in excess of this amount. This was the position envisaged by Fry L.J. in *Howe* v. *Smith*[1] at page 105 and applied in *Shuttleworth* v. *Clews*.[2] In their Lordships opinion therefore the contract means unambiguously that in the event of a failure by the purchaser to complete and notice to terminate being given under clause 5, the vendor is at liberty to forfeit the deposit and to claim for any damage which he has suffered over and above the amount of the deposit, after giving credit for the amount of the deposit.

The two statutory provisions contained in sections 65 and 75 of the Contracts (Malay States) Ordinance must now be considered. On the assumption that the agreement unambiguously provides for forfeiture, does either or do both of these sections operate to defeat the provision on the assumption that no damage is proved by the vendor? It needs to be pointed out that the law relating to the forfeiture of deposits has always been treated as entirely distinct and separate from the learning introduced into English law by the distinction between liquidated damages based on a genuine pre-estimate of the loss likely to be suffered in event of a breach and a penalty where equity came to the rescue of the obligee on a bond or other contractual provision imposing a penalty under a contract where the penalty exceeded the actual damage. The latter combination of rules derives from the Chancellor's jurisdiction in equity to relieve an obligee from the harshness of the common law. But the law relating to deposits, as Fry L.J. pointed out in *Howe* v. *Smith*, has a much longer pedigree, being imported from the civil law at least as early as Bracton, and, assuming the deposit or earnest to be reasonable, forfeiture of a deposit was not normally the subject of equitable relief. This appears clearly from the judgment of Jessel M.R. in *Wallis* v. *Smith*[3] at page 258 when he said:

"I come now to the last class of cases. There is a class of cases relating to deposits. Where a deposit is to be forfeited for the breach of a number of stipulations, some of which may be trifling, some of which may be for the payment of money on a given day, in all those cases the judges have held that this rule (that is the rule relating to relief against penalty) does not apply, and that the bargain of the parties is to be carried out."

It is also implicit in the decision in *Howe* v. *Smith* which is the source of all modern learning as to the nature of deposits, and it has been followed again and again ever since. In particular Lord Dunedin in *Mayson* v. *Clouet*[4] establishes the fundamental difference between part payments which are recoverable in certain circumstances and deposits which are not.

The Indian Contract Act (sections 64 and 74) is the source from which sections 65 and 75 of the Contracts (Malay States) Ordinance are taken.

Section 65 of the Ordinance and section 64 of the Indian Act are to be found in that part of the statute which deals with the performance of contract and, as has been pointed out in several places, must be read closely in connection with section 39* (the effect of refusal of the party to perform the promise wholly) and section 55(i)† (the effect of failure of a party to perform in a fixed time a contract in which time is essential).

The text of the section is as follows:

"When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. *The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such a contract,*

* Contracts (Malay States) Ordinance, 1950, s. 40.
† *Ibid*, s. 56(1).

restore such benefit, so far as may be, to the person from whom it was received."

The argument for the respondent in the present case was that the deposit was caught by the latter sentence of the section because it was a "benefit under the contract" and because authorities showed that the word "rescind" in the clause extended to cover the case of an innocent party accepting repudiation or fundamental breach of a contract by the other party as putting the contract at an end.

This point was taken by the respondent before Gill J., in the learned judge's words "somewhat half heartedly", and there is a distinct entry in the notes of Suffian F.J., and Ali F.J., in the Federal Court that it was abandoned during the appeal, with the result that the appellant never argued it. At first sight it is contrary to authority, for it has been held in a number of cases, that a deposit is not "a benefit received under the contract" (within the meaning of section 65), but "a security that the purchaser would fulfil his contract and ancillary to the contract for the sale of the land". See *per* White C.J., in *Natesa Aiyar* v. *Appavu Padayachi*,[5] at page 185. The same decision was reached in *Naresh Chandra Guha* v. *Ram Chandra Samanta and Others*,[6] and in an unreported Malayan case at first instance which was drawn to their Lordships' attention *P. M. Pillay* v. *Kampur Rubber and Tin Company Limited*[7] Azmi J.(as he then was), followed *Natesa Aiyar* v. *Appavu Padayachi, supra*, in holding that the deposit (in that case of $110,000) was:

"not a benefit or advantage within the meaning of sections 65 and 66 of our Contracts Ordinance as having been received under the control [*sic*] but it was a deposit ancillary to the contract and made as a security for the performance of the contract".

The Privy Council case of *Muralidahar Chatterjee* v. *International Film Company Limited*,[8] cited by the learned Chief Justice in his judgment is not an authority to the contrary of these. It has no relation to the question whether a deposit is a benefit under the contract or not. It is simply authority for the proposition that in section 65, where the words "voidable" or "rescind" are used, they can be applicable not merely to cases when a contract is brought to an end *ab initio* for fraud or undue influence or some similar cause, but also to cases where one party elects to terminate a contract repudiated by the other party through anticipatory breach or rejection of its fundamental terms. In 1952, that is nearly ten years after the *Muralidahar* decision, the situation in regard to section 65, and indeed section 75, was such that P. M. Mookerjee J., was able to say in *Naresh Chandra* v. *Ram Chandra*[9] at page 99:

"... It is clear from the Indian authorities, cited above, that notwithstanding the presence of the said sections 64, 65 and 74 (of the Indian Contract Act) on the statute book for all this time the law as laid down in the English case of *Howe* v. *Smith*[1] has been followed and applied in this country (*i.e.*, India) for over half a century. It is clear also that there is nothing in that law which is opposed to justice, equity or good conscience. That law should, therefore, be left undisturbed on principle of *stare decisis*".

As already pointed out, this is nearly ten years after the *Muralidahar* decision to which the learned judge had expressly referred on page 98 of the report only to reject its relevance. Later on in the same judgment, referring to the case of *Bhai Panna Singh* v. *Bhai Arjun Singh*,[10] on which considerable stress was laid in the Federal Court, he said:

"I am not prepared to hold that the Judicial Committee meant, without an express word, — and there is no scope, in the light of what I have said above, also for any necessary implication, — to overrule the rule of law, uniformly laid down in a series of decisions in this country and unsettle the settled law which has been followed and applied here, almost without demur, for over half a century notwithstanding the existence of the Indian Contract Act and the presence of the above-quoted sections therein."

For the above reasons it is clear to their Lordships, first that it was not open to the learned Chief Justice, in the light of the course which the proceedings had taken, to hold that section 65 of the Ordinance was applicable to the circumstances of the existing case and, second, that in any event the point is not one which can be sustained in the light of authorities and the language of the section.

Section 75 of the Ordinance (which corresponds to section 74 of the Indian Act) occurs in that part of the statute which deals with the consequences of breach of contract, and reads as follows:

"When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

The essential point in the argument for the respondent, which was in the event sustained by the Federal Court, is that the deposit forfeited in this case comes within the meaning of the phrase "any other stipulation by way of penalty", and this provision entitles the purchaser to recover his deposit notwithstanding any provision to the contrary in the contract of sale, except to the extent that the court orders "reasonable compensation" to be paid for his failure to complete. It is worth pointing out that the words quoted immediately above do not occur in the original form in which the Indian Contract Act was passed. They were introduced into the Act by way of amendment in 1899. It is indeed noteworthy that notwithstanding the presence of this enactment on the Statute Book in its amended form for over 50 years it was possible for P. M. Mookerjee J. to point out, in the passages quoted above in connexion with both section 74 no less than section 64, that a long series of decisions in the Indian courts held consistently and, as their Lordships think, rightly, that section 74 of the Contract Act (as amended) had no application to the forfeiture by a vendor of a reasonable deposit in a contract for the sale of land. The reason in substance was that, though it is true that section 74 was intended to cut through the rather technical rules of English law relating to the liquidated damages and penalties, and to apply in substance the equitable rule to all cases whether the sum provided in the contract was in substance a penalty or a genuine pre-estimate of the damage likely to be suffered, these technical rules had developed entirely separately from the law relating to

deposits and for a very long time no one thought that the section in the Contract Act which superseded them had any application to the deposit cases, or, at least, wherever the point was argued, it was rejected by the Indian courts.

In addition to the cases cited above their Lordships were referred to *Marian Patter* v. *The Madras Railway Company,*[11] which was the first of the cases to this effect and to the very brief report of the decision of the Privy Council in *Chiranjit Singh* v. *Har Swarup,*[12] which, so far as it goes, supports the same general view.

The sole exceptions to this virtual unanimity even before 1952 seem to be contained in the dissenting judgment of Sadasiva Ayyar J., in *Natesa Aiyar* v. *Appavu Padayachi, supra,* and in the judgment of Mohammed Sharif J., in *Mool Chand Behari Lal* v. *S. D. Chand and Company,*[13] the material part of which was *obiter* for the purposes of his judgment in so far as it deals with earnest money, but in which he holds that it is always for the court to determine what amount should be reasonable compensation under the circumstances of a particular case. Nevertheless, both the learned Chief Justice and Suffian F.J., in the instant case appear to have treated the decision of the Indian Supreme Court in *Fateh Chand* v. *Balkishan Dass*[14] as having overruled or qualified the earlier authorities. But, with respect to both learned judges, this is not a correct interpretation of that decision. The judgment of the court in that case, delivered by Shah J. (as he then was) does not support this view at all, as can be seen by a close examination of paragraphs 6 and 7 of the judgment on page 1410.

It is clear from these paragraphs that the judgment was based on the view that a distinction was to be drawn in the circumstances of that case between a sum of Rs.1,000 expressly named and paid as "earnest money" as to which it was conceded on both sides with the full concurrence of the court that forfeiture was complete and not subject to section 74, and a further sum of Rs.24,000 which the court held was "not of the nature of earnest money" and was therefore subject to the provisions of section 74. Their view to this effect was based upon their construction of the particular contract which provided that this further sum of Rs.24,000 was "out of the sale price" Shah J. then went on to say at page 1410:

> "If this amount was also to be regarded as earnest money, there was no reason why the parties would not have so named it in the agreement of the sale. We are unable to agree with the High Court that this amount was paid as security for due performance of the contract. No such case appears to have been made out in the plaint and the finding of the High Court on that point is based on no evidence. It cannot be assumed that because there is a stipulation for forfeiture the amount paid must bear the character of a deposit for due performance of the contract."

It was on the basis of this decision related to the particular terms of that contract and expressly holding that the sum of Rs.24,000 was not a deposit that the court came to the conclusion at the end of paragraph 9 of their judgment that "the covenant for forfeiture of Rs. 24,000 is manifestly a stipulation by way of penalty". The contrast is between the Rs.1,000 which was forfeited as earnest money, and the Rs.24,000, which, on the construction of that agreement, was part payment, amounting in fact to more than a third of the sale price, and which being part payment was subject to section 74.

In addition to the case of *Fateh Chand, supra,* the learned Chief Justice referred to two Privy Council decisions, *Chiranjit Singh* v. *Har Swarup* and *Bhai Panna Singh* v. *Bhai Arjun Singh.* The first of these cases appears rather to be an authority to the contrary, since Lord Shaw appears to have said:

> "Earnest money is part of the purchase price when the transaction goes forward: it is forfeited when the transaction falls through, by reason of the fault or failure of the vendee."

Counsel for the appellant referred to it before their Lordships as an authority in his favour. Although section 74 is referred to in the headnote there is no reference to it in the actual report of the case, nor does the record show that anything was said about it during the argument. The second Privy Council case referred to in the Federal Court (*Bhai Panna Singh* v. *Bhai Arjun Singh*) seems also to be an authority to the contrary. In that case there is the same distinction between a sum Rs.500 to be received as "earnest money" and a further sum of Rs.10,000 payable either by way of penalty or as liquidated damages in the event of breach. In other words *Bhai Panna Singh* is, like the *Fateh Chand* case in the Indian Supreme Court, an example of the contrast between earnest money which is liable to forfeiture, and a penalty or liquidated damages which are subject to section 74.

On the facts as found, the sum of Rs.500 was forfeited and was not recoverable, though credit had to be given there, as here, for the amount received, but, as the court held, the further sum of Rs.10,000 could not be recovered *"simpliciter"* whether it was penalty or liquidated damages, since the plaintiffs had to prove the damage that they had suffered, and could only recover reasonable compensation under section 74.

If this is an authority for anything it is that "earnest money" is irrecoverable and can be forfeited. In both the *Fateh Chand* and *Bhai Panna Singh* cases, the sums paid as "earnest money" were relatively small. But there is nothing unusual or extortionate in a 10% deposit on a contract for the sale of land, and if the sale price is over $3,000,000 the deposit will be over $300,000.

It follows, therefore, that, once it is decided that the construction of the contract is such that the sum of $377,500 was paid as a true deposit, that is, on the same terms as the deposit in *Howe* v. *Smith,* and was thus to be liable to forfeiture under the contract, in case of failure by the purchaser to complete, section 75 of the Contracts (Malay States) Ordinance can have no application when the contract is properly terminated and the deposit is forfeited whether or not damage is proved. There is in their Lordships' judgment no difference in this context between the expression "deposit" and the expression "earnest money". In this context they are two words for the same thing, although in common modern English usage "earnest money" has

a slightly archaic ring. As Fry L.J. said in *Howe* v. *Smith* at page 101:

"It (*i.e.*, the deposit) is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by fear of its forfeiture a motive in the payer to perform the rest of the contract."

It is worth pointing out that the contract in *Howe* v. *Smith* provided that the sum of £500 there in question was as here paid "as a deposit and in part payment of the purchase money" and Cotton L.J. at page 95 in referring to the judgment of James L.J. in *Ex parte Barrell*,[15] said:

"What is the deposit? The deposit, as I understand ... is a guarantee that the contract shall be performed. If the sale goes on of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract, it goes in part payment of the purchase money for which it is deposited; but if on default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then ... he can have no right to recover the deposit."

Or, more simply, in the words of Lord MacNaghten in *Soper* v. *Arnold*[16] at page 435:

"Everybody knows what a deposit is. ... The deposit serves two purposes — if the purchase is carried out it goes against the purchase money — but its primary purpose is this, it is a guarantee that the purchaser means business; and if there is a case in which a deposit is rightly and properly forfeited it is, I think, when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not."

No doubt, as Cotton L.J. says in *Howe* v. *Smith* at page 95, there may be cases when equity would relieve a purchaser who has paid a deposit and then defaulted, although it is to be said that the last word is probably not yet spoken on this subject. See *Stockloser* v. *Johnson*.[17] It is also no doubt possible that in a particular contract the parties may use language normally appropriate to deposits properly so-called and even to forfeiture which turn out on investigation to be purely colourable and that in such a case the real nature of the transaction might turn out to be the imposition of a penalty, by purporting to render forfeit something which is in truth part payment. This no doubt explains why in some cases the irrecoverable nature of a deposit is qualified by the insertion of the adjective "reasonable" before the noun. But the truth is that a reasonable deposit has always been regarded as a guarantee of performance as well as a payment on account, and its forfeiture has never been regarded as a penalty in English law or common English usage.

In the result therefore their Lordships will advise the Head of Malaysia that the appeal should be allowed and the judgment of the trial judge dismissing the respondent's claim restored and that the respondent should pay the costs of the appeal and of the hearing before the Federal Court.

Appeal allowed.

Solicitors: *E. F. Turner & Sons.*

A SINGAPORE REPORTS

YIK WAH TRADING (PTE) LTD. v. TAN KING KAK & ANOR.

[O.C.J. (Winslow J.) December 22, 1971]

[Singapore — Suit No. 1619 of 1970]

Moneylenders — Loan transaction — Joint promissory note by borrower and surety — Memorandum in writing — Various contraventions of the provisions of the Moneylenders Ordinance, 1959, ss. 16, 26 and 30.

This was a claim by the plaintiffs, a private limited company carrying on the business of licensed moneylenders, for $5,000 with interest against the first defendant, Tan King Kak and the second defendant, Sam Trading Co. (sued as a firm of which Tan King Kak himself is the sole proprietor) on a promissory note dated April 29, 1970. It was undisputed that the second defendant company was a surety of the first defendant. Alternatively, the plaintiffs' claim was against the second defendant (Sam Trading Co.) alone as drawer of two cheques dated July 2, 1970 totalling $5,000 payable to cash or bearer which were dishonoured and still remained unpaid.

The defence as pleaded was to the effect that —

(a) the plaintiff company was prepared to lend $3,000 only in the first instance;

(b) if the first defendant wanted $5,000 he would have to pay $500 service charges;

(c) the said sum of $500 was accordingly paid by the first defendant;

(d) the plaintiff company gave him two crossed cheques, one for $3,000 and another for $2,000.

The first defendant also pleaded that he did not understand the English language and that the promissory note was accordingly void and unenforceable because of non-attestation as required by section 30 of the Moneylenders Ordinance, 1959.

The first defendant also claimed in his defence that no copy of the said promissory note duly authenticated by the plaintiff company was delivered to him as required by section 16 of the said Ordinance and that the said promissory note did not fully contain the terms of the contract between the parties.

The defence also claimed that two cheques totalling $5,000 were taken by the plaintiff company as additional or collateral securities in respect of the money-lending transaction between the parties and that these cheques were not in the name of the plaintiff company.

The defence of the second defendant adopted the above contentions.

Held: (1)(a) there was a clear contravention of section 26 of the Moneylenders Ordinance with regard to the taking of service charges; (b) there was a clear contravention of section 30 of the Ordinance in that as the borrower was a person who did not understand the written language on the promissory note which was taken as security, the note was void; (c) no copy of the promissory note, authenticated by the lender, was delivered to the defendant; (d) the taking of two cheques from the second defendant as additional security, in the name of the registered moneylender, had been omitted from the contract, which was a clear contravention of section 16 of the Moneylenders Ordinance;

(2) as to the alternative claim against the second defendant, the cheques could not be regarded *in vacuo* as cheques given otherwise than as cheques given by a surety. The terms of the contract between the parties were not set out in the promissory note. Moreover, the cheques were not made out in the authorized name of the licensed moneylender as payee, as required by section 8(a) of the Ordinance, and the taking of such cheques was accordingly illegal;

(3) therefore, as the claim against the borrower failed, the claim against the surety became unenforceable.

Per curiam: "The provisions of the Moneylenders Ordinance as they stand would be rendered farcical if money-